L. W. CYRIS v. K. G. A. GUNADASA

[A. C. J. (Spenser Wilkinson J.) November 25, 1954]

[Penang — Civil Appeal No. 15 of 1954]

Procedure — Subordinate Courts Rules, 1950, O. 12, r. 5 — Judgment in default — Application to set aside such judgment.

This was an appeal against the refusal of the President, Sessions Court, to set aside a judgment given in default in the absence of the appellant. The appellant had filed a written defence before the application to set aside the judgment and it appeared from this that the appellant had a good defence on the merits.

Held: (1) while the learned Magistrate was correct in giving judgment against the appellant in the first instance this did not affect the question whether the judgment should be set aside; (2) as it appears from his written defence that the appellant had disclosed a good defence to the claim, his application to set aside the default judgment should be allowed.

Cases referred to:—

(1) *J. M. Gomes & Co. v. Saurajen Visva Nathan* (1954) M.L.J. 3.

(2) *Evans v. Bartlam* (1937) A.C. 473; 53 T.L.R. 680.

CIVIL APPEAL.

H. E. P. P. Powell for the appellant.

Respondent in person.

Spenser Wilkinson J. : — In this case the respondent who was the plaintiff in the Magistrate's Court obtained judgment in default in the absence of the appellant when the case was called on for hearing. No defence had been filed, although it should have been filed two days before the hearing. The appellant subsequently made an application to set aside the default judgment on the ground that he had attended at the wrong Court on the day fixed for hearing and also that he had a good defence to the claim.

The case was heard by the President of the Sessions Court sitting as a Magistrate. The appellant appealed both against the judgment and against the refusal of the learned Magistrate to set aside the judgment on two main grounds. The first point taken was that the Summons in the action was headed "In the Magistrate's Court at Georgetown" but called upon the defendant to appear before the Sessions Court at 9.30 a.m. on the 12th October, 1954. His complaint was that this Summons was bad in form as it left the appellant in doubt as to where to attend and did not indicate in which Court his defence was to be filed.

If this point had stood alone, I do not think it would be sufficient to induce me to reverse the learned Magistrate's decision. I am inclined to agree with Counsel for the appellant that a Summons headed "In the Magistrate's Court" calling upon a defendant to appear in the Sessions Court although not actually irregular is at least confusing. I think it would make for greater clarity if the Summons stated that the defendant was to appear in the Court House of the Sessions Court, but I do not think the appellant in this case was seriously misled.

In my opinion, however, there is more substance in the appeal against the refusal to set aside the judgment on the ground that the defendant had a good defence on the merits. It would appear from the Court File that the defendant's written defence had, in fact, been filed before the application was made to set aside the judgment and, although this defence was late, I think it should have been looked at. A Court will always be inclined to set aside a judgment in default upon suitable terms, if it is satisfied that the defendant has a good defence on the merits, and the written statement filed in this case appears to me to disclose a defence.

In reaching his decision the learned Magistrate appears to have relied to some extent upon the decision in *J. M. Gomes & Co. v. Saurajen Visva Nathan*[1]. As this question of default judgments in Subordinate Court is of considerable practical importance I think I ought to make some comments upon that decision, which, as I read it, turned rather upon the question of default of defence than upon the question of setting aside a judgment. In the first place a very significant fact in that case was that at no material time was any defence to the claim disclosed. This is of the greatest importance, because upon the English authorities it is clear that in the High Court when it is sought to set aside a judgment which is regular it is an almost invariable rule that merits should be shown (see notes in the *Annual Practice*, 1954, to Order 27 rule 15 under the heading "Regular Judgments"). The case in question, moreover, was an appeal against a decision of the Sessions Court precluding the defendant from defending a claim. No application had been made (as was done in the case now before me) to the Sessions Court to set aside the judgment and in so far as the Appellate Court was asked to set aside the judgment this was on the ground that the order appealed against was wrong. The appeal was not based or argued upon the inherent power of the Court to set aside a judgment in default upon such terms as may be just. I think this is clear, because none of the English cases relating to setting aside default judgments was cited or referred to.

Had the defendant in that case been able to show that he had a substantial ground of defence the learned Judge, having decided that the Sessions Court had

rightly exercised its discretion in precluding the defendant from defending, might have gone on to set aside the judgment upon the principles laid down by the House of Lords in *Evans v. Bartlam*[2]. As, however, no merits were either proved or suggested, this point never arose, so that the decision in that case amounts to this — that the power of the Sessions Court to preclude the defendant from defending is discretionary and that the discretion had been properly exercised.

In so far therefore as the judgment in the present case is alleged to have been obtained irregularly I followed the decision in *J. M. Gomes*[1] *case* and held that the learned Magistrate was entirely correct in giving judgment against the defendant in the first instance.

This, however, left entirely untouched the main question before me in this appeal as to whether that judgment should be set aside. The principles which govern the question of setting aside default judgments are laid down by the House of Lords in the case of *Evans v. Bartlam*[2], the relevant part of the headnote of which, as reported in the Times Law Reports, is as follows:—

"Held, ... that, unless and until the Court has pronounced a judgment on the merits or by consent, it has the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

The Court of Appeal is not limited to interfering with a Judge's exercise of discretion only if it is of opinion that he acted on some wrong principle of law, but has both the power and the duty to interfere if it is seen that on other grounds the Judge's decision will result in injustice being done."

It is true that this decision rests to some extent upon the relevant English rules of Court, but the principles I think apply to the Subordinate Courts by virtue of the provisions of Order 36 rule 19, which expressly preserves the inherent power of the Court to make such orders as may be necessary to prevent an injustice. If a defendant, who has in fact a complete defence to the claim, has by his own foolishness or carelessness allowed judgment to go by default it appears to me that there will be an injustice, if he is not allowed to put his defence before the Court; and the defendant's fault, if any, can (to use the words of Lord Wright in the same case) "be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose". The relevant rule as to terms in the Subordinate Courts Rules is Order 12 rule 5.

In the circumstances I came to the conclusion that the proper course was to set aside the default judgment and to order that the case be re-tried by a different Magistrate. I would have imposed as terms upon which the judgment was to be set aside that the articles in question in the Suit be brought into Court; but as I was informed that these articles were already in the hands of the bailiff this was unnecessary.

Re-trial ordered.

Solicitors for the appellant: *H. E. P. Powell & Co.*

SMITH CONSTRUCTION CO. LTD. v. PHIT KIRIVATNA (f)

[O. C. J. (Spenser Wilkinson J.) December 10, 1954]

[Penang — Civil Suit No. 55 of 1953]

Contract — Building contract — Where the certificate of the architect can be dispensed with — Uncompleted building — Claim on quantum meruit.

This was a claim on a building contract. The plaintiffs were employed as contractors to build a house for the defendant. As a result of information given by the defendant to the plaintiffs' representative the house was built so as partly to encroach an adjoining land. When this was found the representative of the architect requested the plaintiffs to proceed slowly with the work pending a settlement with the owner of the encroached land. The plaintiffs thereupon asked that they be paid for the work already done and asked for a certificate. The certificate was not given and the Solicitors for the plaintiffs thereupon wrote stating that they had still not received the certificate that this was an obvious breach of the contract and therefore the plaintiffs had stopped work and were issuing a writ. In the meantime the architect's representative wrote to the contractors stating that the work was not proceeding with due diligence and giving twenty four hours notice in which to proceed with the work in an efficient and expeditious manner failing which he would request the employer to take action under Clause 18 of the agreement.

Held: (1) in the circumstances of this case the defendant is precluded from raising that point that the architect's certificate is a condition precedent to payment; (2) there should in this case be implied a contract by the defendant to pay for the work done and therefore the plaintiffs are entitled to recover the full amount of the work and labour due and materials supplied and together with additional days as they have suffered by reason of the slowing down and stoppage of the work.

Cases referred to:—

(1) *Pawley v. Turnbull* (1861), 66 E.R. 327; 3 Giff. 70.

(2) *Hickman v. Roberts* (1913) A.C. 229.

(3) *Gutter v. Powell* 6 T.R. 320.

(4) *Munro v. Butt* 8 E. & B. 738.

(5) *Lysaght v. Pearson* Not reported, except in *Times* Newspaper of March 3, 1879.

(6) *Sumpter v. Hedges* (1898) 1 Q.B. 673.

(7) *Roberts v. Bury Commissioners* L.R. 5 C.P. 310.

CLAIM on contract.

R. D. Hume for the plaintiffs.